NO. 99243-6

SUPREME COURT OF THE STATE OF WASHINGTON

KATY ARLENE TURNER, individually and as the Personal Representative of the ESTATE OF KENT ALLEN TURNER, Deceased,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF SOCIAL & HEALTH SERVICES; and LEWIS MASON THURSTON AREA AGENCY ON AGING,

Respondent,

and

RES-CARE WASHINGTON, INC., a Delaware corporation; and LIFE THERPEAUTIC WORKS, LCC, a Washington Limited Liability Corporation,

Defendants.

WASHINGTON STATE HEALTH CARE AUTHORITY'S AMICUS CURIAE BRIEF

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I. INTEREST OF AMICUS CURIAE

Over two million Washingtonians have health care coverage because of Washington's Medicaid program. Washington State Health Care Authority, *Apple Health client eligibility dashboard* (Dec. 2020).[1,2] In the 2017-19 biennium, the services offered to Washington citizens under the State's Medicaid plan required an expenditure of over $17 billion dollars with the federal government supplying $11.6 billion of the funding. Senate Ways & Means Committee, *Ways & Means Briefing Book*, at 36 (Jan. 2019) ("*Ways & Means Briefing Book*").[3]

At all times relevant to the underlying facts of this case, the Health Care Authority (HCA) was the single-state executive agency in the State of Washington responsible for administering the Medicaid program. *See* RCW 41.05.021(1)(m)(i); RCW 74.09.530(1)(a). As the State's Medicaid agency, HCA delegates authority to the Department of Social and Health Services (DSHS) to administer certain Medicaid programs for aging and disabled clients. *See* RCW 41.05.021(1)(m)(iii).

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[1] https://hca-tableau.watech.wa.gov/t/51/views/ClientDashboard-Externalversion /AppleHealthClientDashboard?:isGuestRedirectFromVizportal=y&:embed=y (last acces sed, Jan. 22, 2021).

[2] Reviewing courts can take notice of "legislative facts," e.g. "social, economic, and scientific facts that 'simply supply premises in the process of legal reasoning.' Under this doctrine, a court can take notice of scholarly works, scientific studies, and social facts." *Wyman v. Wallace*, 94 Wn.2d 99, 102-03, 615 P.2d 452 (1980) (internal citations omitted). Reviewing courts must "have the unrestricted ability to employ judicially noted 'legislative facts' in formulating legal rules . . . Judicial notice of legislative facts is frequently necessary when, . . . a court is asked to decide on policy grounds whether to continue or eliminate a common law rule." *Id*.

[3] https://leg.wa.gov/Senate/Committees/WM/Documents/Publications/Briefing Book/2019 Briefing Book_Final %28website%29.pdf.

The issues raised by the Appellant on appeal in this case, Kathy Turner for the Estate of Kent Turner, implicate (1) DSHS's ability to operate its Long Term Care Services and Supports program in compliance with federal Medicaid law; and (2) the Legislature's ability to ensure that funding for the State's Medicaid program remains within a sustainable level.

In light of these issues, HCA is submitting this amicus brief to assist the Court in understanding Washington's Long Term Services and Supports (LTSS) program, HCA's and DSHS's obligations under state and federal law with respect to the provision of medical assistance and care services for Medicaid recipients, and to demonstrate the negative effect of reversing the Superior Court's ruling finding no liability for DSHS.

Issues Presented

Medicaid clients have the right to choose how and from whom they receive long term care services for which they qualify. Would imposing a duty on DSHS to protect a client from his or her own choices about receiving long term care services interfere with that right and thereby violate Medicaid law and jeopardize federal funding of the State's Medicaid Program?

II. BACKGROUND OF WASHINGTON'S MEDICAID PROGRAM

Medicaid is a jointly-financed federal and state program designed to provide medical assistance to qualifying individuals. *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 323, 135 S. Ct. 1378,

191 L. Ed. 2d 471 (2015). Like other Spending Clause legislation, Medicaid allows a participating state to receive federal funds in exchange for an agreement to use those funds in compliance with Congressionally-imposed conditions. *Armstrong*, 575 U.S. at 323. States must submit a "State Plan" to the U.S. Centers for Medicare and Medicaid Services (CMS). *Id*. The State Plan is a comprehensive written statement describing the nature and scope of the state's Medicaid program and assuring compliance with federal law. *Id.*; 42 U.S.C. § 1396a(a); 42 C.F.R. §§ 430.10, 430.12.

A. HCA and Washington's Medicaid Program

The Washington State Legislature has designated HCA as the agency responsible for administering Medicaid in Washington and for obtaining federal approval for the State Plan. *See* RCW 41.05.021(1)(m)(i); RCW 74.09.530(1)(a). CMS is the unit within the federal Department of Health and Human Services that administers Medicaid. *See*, *e.g.*, 42 C.F.R. §§ 430.10, 430.14. HCA is responsible for complying with federal Medicaid law, which includes regulations and guidance promulgated by CMS. RCW 74.04.050(4). "Although participation in the Medicaid program is entirely optional, once a State elects to participate, it must comply with the requirements of Title XIX." *Harris v. McRae*, 448 U.S. 297, 301, 100 S. Ct. 2671, 65 L. Ed. 2d 784 (1980). If CMS concludes that a state is out of compliance with federal requirements, CMS has authority to withhold all or a portion of a state's Medicaid funding. *See* 42 U.S.C. § 1396c; 42 C.F.R. §§ 430.1, 430.35(a), 430.40(a), 430.42(a), 447.304(c).

Although the Medicaid Act imposes many obligations on states that participate in the Medicaid program, HCA has authority, when designing, implementing and managing its Medicaid programs, to determine "the proper mix of amount, scope, and duration limitations on coverage, as long as care and services are provided in 'the best interests of the recipients.' " *Alexander v. Choate*, 469 U.S. 287, 303, 83 L. Ed. 2d 661 (1985) (quoting 42 U.S.C. § 1396a(a)(19)). The State Plan is only required to provide services that are sufficient in amount, duration, and scope to reasonably achieve the State Plan's purpose. *S.A.H. ex rel. S.J.H. v. State, Dep't of Soc. & Health Servs.*, 136 Wn. App. 342, 351, 149 P.3d 410 (2006), 42 C.F.R. § 440.230.

One significant right of Medicaid beneficiaries is the ability to choose who provides their care. Courts have called this federal mandate the "free-choice-of provider requirement." *Planned Parenthood of Arizona, Inc. v. Betlach*, 727 F.3d 960, 962 (9th Cir. 2013). Medicaid beneficiaries have the right to access their benefits and care from "any [provider] qualified to perform the service or services required." 42 U.S.C. § 1396a(a)(23). *See also* 42 C.F.R. § 431.51. This federal right to choose among a range of qualified providers confers an implied right to be free from government interference; for example, the state cannot interfere with a Medicaid recipient's choice to remain in a nursing home of her choice, so long as the nursing home is a qualified Medicaid provider. *See O'Bannon v. Town Court Nursing Center*, 447 U.S. 773, 785, 100 S. Ct. 2467, 65 L. Ed. 2d 506 (1980). Medicaid recipients have a private right of action

to seek injunctive relief against a state if the state interferes with their right to freely choose a qualified provider from which to receive services. *Betlach*, 727 F.3d at 968 ("free-choice-of-provider" right can be enforced under § 1983).

III. MEDICAID AND LONG TERM SERVICES AND SUPPORTS

HCA delegates authority to DSHS to administer Medicaid programs for eligible aging and disabled clients. *See* RCW 74.09.530(1)(d), .520; RCW 41.05.021(1)(m)(iii). This delegation includes authorizing DSHS to administer Long Term Services and Supports (LTSS) and Home & Community-Based Services (HCBS), while HCA maintains ultimate policymaking authority and oversight responsibility. Medicaid State Plan Administration, Washington State Plan, at 7-8, 11-13[4]; RCW 43.20A.865.

Washington was one of the first states to take advantage of the ability to offer home and community based personal care services and it is recognized as a national leader. Joint Legislative Exec. Committee on Aging and Disabilities Issues, *2014 Final Report*, at 20 (Dec, 2014) ("*2014 Final Report*")[5]; RCW 74.39.010. The Legislature recognized that individuals prefer "to remain in their own homes and communities where they can maximize independence, self-determination, and community participation." *2014 Final Report*, at 20. *See also* RCW 74.39A.007

[4] https://www.hca.wa.gov/assets/program/SP-Medicaid-State-Plan-Administration.pdf.

[5] https://leg.wa.gov/JointCommittees/ADJLEC/Documents/JLEC%20Final%20Report.pdf.

(declaring the Legislature's intent that LTSS "promote individual choice, dignity, and the highest practicable level of independence").

In administering the Medicaid LTSS program, federal Medicaid law does not require states to guarantee the safety of Medicaid clients. Instead, Medicaid law requires states only to protect the health and safety of clients by imposing reasonable safeguards that ensure Medicaid providers are properly qualified. *See* 42 C.F.R. § 441.302. As noted above, Washington has authority when determining "the proper mix of amount, scope, and duration limitations on coverage." *Choate*, 469 U.S. at 303. As such, state Medicaid programs are not obligated to guarantee that Medicaid recipients will receive a level of health care exactly tailored to their particular needs. *Id*. Rather, the Medicaid benefit provides "a particular package of health care services," which "has the general aim of assuring that individuals will receive necessary medical care, but the benefit provided remains the individual services offered—not 'adequate health care.'" *Id*. For example, personal care services is an optional benefit under Medicaid, and Washington has chosen to provide this additional benefit in its State Plan. *See* 42 C.F.R. § 440.225; Medicaid State Plan Administration, Washington State Plan, at 7-8, 11-13.[6] Further, because the provision of personal care services or long term care services is an optional benefit, coverage is dependent upon the state's funds. ¶ *v. Dreyfus*, 697 F.3d 706, 709, 710 (9th Cir. 2012); RCW 74.09.520.

[6] https://www.hca.wa.gov/assets/program/SP-Medicaid-State-Plan-Administration.pdf.

Medicaid LTSS clients have the right to choose which services they want to accept, where they receive services, and from whom they receive services. 42 C.F.R. § 441.540. For example, a LTSS client has the right to choose to receive their services in their own home, an adult family home, a community residential care facility, an assisted living facility, or a nursing facility. WAC 388-106-0030. Although an array of provider types are available, according to the Washington Caseload Forecast Council, over 60,000 people in Washington choose to receive Medicaid personal care in home and community based settings, and of those about 75 percent choose to receive care in their own homes. Caseload Forecast Council, *Long Term Care Home and Community Services* (Nov. 10, 2020).[7] That number continues to grow. By comparison, a little over 8,000 Medicaid beneficiaries are receiving care in nursing homes. Caseload Forecast Council, *Long Term Care Nursing Homes* (Nov. 10, 2020).[8]

As mandated by the Legislature, the LTSS program is intended "to meet the needs of consumers and to maximize effective use of limited resources[,]" and be "cost-effective for the state[.]" RCW 74.39A.007(2), (3). Medicaid is the primary public payer of LTSS. *2014 Final Report*, at 20. During the 2017-2019 Biennium Budget, Medicaid provided over $2.8 billion dollars of federal funding for LTSS in Washington. Washington

[7] https://www.cfc.wa.gov/HumanServices_LTC_HCS_Total.htm (last accessed Jan. 22, 2021).

[8] https://www.cfc.wa.gov/HumanServices_LTC_HCS_NH.htm (last accessed Jan. 22, 2021) (until the pandemic, this number was usually between 9,000-10,000).

State Operating Budget, 2017-19 Omnibus Operating Budget—2019 Supplemental.[9]

A. LTSS Assessment and Care Planning

The process to become an LTSS client begins when an individual submits a Medicaid application and requests LTSS from DSHS. WAC 388-106-0025. A DSHS representative uses the Comprehensive Assessment Reporting Evaluation (CARE) tool to conduct an assessment to determine whether the individual is functionally eligible for LTSS. WAC 388-106-0055.

Specifically, to be eligible for LTSS an individual must meet "nursing facility" level of care. WAC 388-106-0277, -0310. This is a threshold determination meaning that while the individual is eligible for services and can choose to receive those services in a nursing facility, it does not mean that the individual requires 24-hour care or skilled nursing services. An individual can be very independent and still meet the requirement for "nursing facility level of care." WAC 388-106-0355.

The assessment results are also used to "initially classify, rate, and determine a recipient's level of need," consistent with the Medicaid program's purpose. WAC 388-106-0055; *Jenkins v. Dep't of Soc. & Health Servs.*, 160 Wn.2d 287, 299, 157 P.3d 388 (2007); 42 U.S.C. § 1396d(a)(24). As directed by the Legislature, the CARE assessment evaluates and scores an individual based on factors like the individual's

[9] http://fiscal.wa.gov/OperatingSingleVersionPrior.aspx (last accessed Jan. 22, 2021).

mental status and ability to perform activities of daily living and then uses an algorithm to determine the client's relative acuity and assign benefit level. RCW 74.09.520(3) (the personal care services benefit shall be provided to the extent funding is available according to the assessed level of functional disability).

The CARE tool places the client in 1 of 17 classification groups. WAC 388-106-0125. Each group has a set number of base Medicaid personal care hours for in-home care or corresponds to a daily rate for residential settings. WAC 388-106-0120, -0125. The lowest acuity level that meets "nursing facility level of care" results in a classification of "Group A Low" and receives only 22 base hours per month for in-home personal care. WAC 388-106-0125. The highest acuity classification, "Group E High," has a benefit level of 393 base hours per month or about 13 hours per day. WAC 388-106-0125.

The CARE assessment does not determine the amount of care necessary to meet the actual needs of a particular client or to necessarily keep an individual out of a nursing home. *M.R.*, 697 F.3d at 710 (undisputed that the CARE assessment assesses individual needs but does not guarantee "a minimum level of care needed to keep an individual at home or outpatient locations, rather than in a nursing home."). Instead, it calculates a client's relative acuity and determines the level of service and support a client is

eligible to receive under the Medicaid program. Medicaid State Plan Administration, Washington State Plan Attachment 3.1.K, at 11.[10]

After the assessment is completed, the next step is developing a care plan. Medicaid regulations require this to be a "person-centered planning process [] driven by the individual" and obligates the DSHS representative to provide "necessary information and support to ensure that the individual directs the process to the maximum extent possible, and is enabled to make informed choices and decisions." 42 C.F.R. § 441.540. Under Washington's State Plan, and in conformity with Medicaid requirements, clients "may select from all available services and supports for which they have an assessed need and are eligible to receive," and may select from "all qualified and contracted providers of those services when developing their person-centered service plan." Medicaid State Plan Administration, Washington State Plan Attachment 3.1.K, at 13.[11] The care plan must list the "home and community-based settings that were considered by the individual," "reflect that the setting in which the individual resides is chosen by the individual," includes a description of the "services and supports (paid and unpaid) that will assist the individual to achieve identified goals," and acknowledge risk factors and measures in place to minimize them. 42 C.F.R. § 441.540. The client must agree to the care plan and consent to it in writing. *Id*.

[10] https://www.hca.wa.gov/assets/program/SP_Att_3.1-K_CommunityFirstChoice.pdf.

[11] https://www.hca.wa.gov/assets/program/SP_Att_3.1-K_CommunityFirstChoice.pdf.

Once DSHS has conducted the CARE assessment, has found the individual "financially and functionally eligible for services[,]" the client has participated in developing a care plan and consented to services, and has chosen a provider, the provision of LTSS services can begin. WAC 388-106-0045. Although the client *may* begin receiving LTSS services at that point, he or she also has the right to refuse services, not accept case management services he or she may not want to receive, make his or her own choices about the services he or she may or may not want, and choose or change his or her qualified provider. WAC 388-106-1300(4), (5), (14).

Therefore, a client's choice to accept LTSS services is purely voluntary—the client can choose their provider, where they receive services, which of the offered services they would like, and the amount of their benefit or services they utilize. *See* WAC 388-106-0045, -1300, -1303. Thus, based on these federal and state requirements, DSHS has no authority to choose where an LTSS client may receive their public benefit, require that a LTSS client select a particular provider or provider type, or direct a provider to agree to provide care for a LTSS client. *See* 42 U.S.C. § 1396a(a)(23); 42 C.F.R. § 431.51.

IV. ARGUMENT

State and Federal law empower the client—not the Medicaid agency—to choose her Medicaid provider. Regardless of the level of assistance a client may qualify for, ultimately, it is the client's decision

whether to obtain those services in a facility or in her home. While the Legislature directs the agency to promote independence as much as possible, the new duty for which Appellants advocate could have the opposite effect—incentivizing DSHS to encourage clients to accept services in more supervised and restrictive settings than in their own homes. This is contrary to the spirit and the letter of Medicaid law. 42 C.F.R. § 441.540; RCW 74.39A.007(1), (2) (LTSS to be provided in a manner that "promote[s] individual choice, dignity, and the highest practicable level of independence[,]" and "maximize[s] effective use of limited resources").

Imposition of a broad duty of care on DSHS based on its assessment activities and its participation in developing a Medicaid client's care plan would put the agency on a collision course with the client's rights. DSHS not only lacks any concomitant authority to select and control the provision of care or the choices and behavior of the client, but is explicitly constrained by Medicaid requirements from interfering with the client's choices. Any attempt by DSHS to substitute its judgment for the client's as to the best provider for that individual would run afoul of Medicaid's free-choice-of-provider requirement and risk the potential withholding of billions of dollars of federal Medicaid funds from the State. *See* 42 U.S.C. § 1396c; 42 C.F.R. §§ 430.1, 430.35(a), 430.40(a), 430.42(a), 447.304(c). In short, the Appellant's attempt to impose a new duty on DSHS, if granted, would have profound effects to the HCA's and DSHS' continued ability to serve the millions of Washingtonians who depend on Medicaid for their healthcare.

A. Violation of Medicaid Law and Implications for State Medicaid Funds

Because Washington participates in the Medicaid program, it must comply with Medicaid law. *Armstrong*, 575 U.S. at 323. The "'freedom of choice' principle" or mandate requires Medicaid State Plans and programs to allow Medicaid recipients to choose what provider they receive services from and to be free from governmental interference in that choice. *Guzman v. Shewry*, 552 F.3d 941, 951-52 (9th Cir. 2009) (internal citation omitted); 42 U.S.C. § 1396a(a)(23); *O'Bannon*, 447 U.S. at 785; *Betlach*, 727 F.3d at 966, 968. If a governmental entity, like DSHS, interferes with this right by refusing to authorize payment for services, or by substituting its judgment for a client's own choice, in an attempt to reduce tort liability, then the client would have a right of action under 42 U.S.C. § 1983 against DSHS. *O'Bannon*, 447 U.S. at 785; *Betlach*, 727 F.3d at 966, 968.

In addition, the Legislature has directed DSHS to operate the LTSS program to ensure that personal care services are provided to eligible persons in conformance with federal regulations. RCW 74.09.520(2). As discussed above, Medicaid recipients have a right to choose a provider, and Washington's laws and regulations reflect this federal Medicaid mandate. Further, Washington's laws and regulations for the LTSS program reflect an individual's right to refuse care. *See e.g.*, *Matter of Welfare of Colyer*, 99 Wn.2d 114, 121-22, 660 P.2d 738 (1983); WAC 388-76-10245, -78A-2660, -106-1300. Nowhere in the RCW does the Legislature grant DSHS the authority to make decisions for or control a competent adult who

merely applies for, and opts to receive, LTSS services. [12] *See Ass'n of Wash. Bus. v. Dep't of Revenue*, 155 Wn.2d 430, 437, 120 P.3d 46 (2005) (an agency's powers are limited to what is expressly given to it and those necessarily implied from the Legislature). Also, as discussed above, Medicaid law does not require DSHS to ensure the safety of LTSS clients nor does it obligate DSHS to guarantee that LTSS clients will receive a particular amount of services exactly tailored to meet their particular needs. *See Choate*, 469 U.S. at 303; *S.A.H.*, 136 Wn. App. at 351.

CMS could withhold Washington's Medicaid funds based on DSHS's failure to comply with Medicaid requirements. *See* 42 U.S.C. § 1396c; 42 C.F.R. §§ 430.1, 430.35(a), 430.40(a), 430.42(a), 447.304(c). If CMS were to withhold all or part of the Medicaid funds Washington receives, this could negatively impact over two million Medicaid enrollees' ability to receive medical assistance and care. Washington State Health Care Authority, *Apple Health client eligibility dashboard* (Dec. 2020).[13] Even if limited to those Medicaid enrollees receiving LTSS, this would affect at least 69,000 clients. *See* Caseload Forecast Council, *Long Term*

[12] Further, even where a LTSS client's incompetence is established through a guardianship, the guardian cannot force the LTSS client to receive care in a nursing home or other facility without a court order issued under chapters 10.77, 71.05, and 72.23 RCW. RCW 11.92.190. *See also Raven v. Dep't of Soc. & Health Servs.*, 177 Wn.2d 804, 821-22, 306 P.3d 920 (2013) (where a guardian determines in good faith that a nursing home placement is against the client's wishes, and the client indicates nothing to the contrary, no negligence found for not pursuing placement in a nursing home).

[13] https://hca-tableau.watech.wa.gov/t/51/views/ClientDashboard-Externalversion/AppleHealthClientDashboard?:isGuestRedirectFromVizportal=y&:embed=y (last accessed Jan. 22, 2021).

Care Home and Community Services (Nov. 10, 2020)[14]; Caseload Forecast Council, *Long Term Care Nursing Homes* (Nov. 10, 2020).[15]

During the 2017-2019 Biennium Budget, the State received over $2.8 billion federal dollars for Medicaid recipients receiving LTSS, and the State received $11.6 billion federal dollars for the State Medicaid program. Senate Ways & Means Committee, *Ways & Means Briefing Book*, at 36 (Jan. 2019) ("*Ways & Means Briefing Book*")[16]; Washington State Operating Budget, 2017-19 Omnibus Operating Budget—2019 Supplemental.[17] In 2019, the amount of funds the federal government provided the State made up 68% of the State's Medicaid program budget. *Ways & Means Briefing Book*, at 37. If CMS were to withhold the funds received for LTSS—and potentially more, as it has the authority to withhold all or part of the State's Medicaid funds—the State would have to either make up for this significant budgetary gap to continue the level of services currently offered or reduce the services offered in the State Plan. This result would be contrary to the Legislature's explicitly stated purpose that LTSS be provided in a manner that "promote[s] individual choice, dignity, and the highest practicable level of independence[,]" and "maximize[s] effective use of limited resources[.]" RCW 74.39A.007(1), (2).

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[14] https://www.cfc.wa.gov/Handouts/LTC_HCS_HCS.pdf.

[15] https://www.cfc.wa.gov/Handouts/LTC_HCS_nh.pdf.

[16] https://leg.wa.gov/Senate/Committees/WM/Documents/Publications/Briefing Book/2019 Briefing Book_Final %28website%29.pdf.

[17] http://fiscal.wa.gov/OperatingSingleVersionPrior.aspx (last accessed Jan. 22, 2021).

V. CONCLUSION

Federal and state Medicaid law guarantee individual clients the right to choose their providers without government interference. Washington's long-term care service and support benefit expands the array of providers available to these clients by allowing them to receive assistance in community based settings, including their own homes. By contrast, the new duty that the Appellant seeks to create, while seeming to benefit clients, would have the opposite effect: by expanding the agency's liability for the consequence of choices made by thousands of competent adults, the Appellant would create a perverse incentive for the agency to limit the ability of Medicaid clients to receive assistance in preferred, less restrictive settings. Such an outcome could force DSHS and HCA into conflict with federal Medicaid law. Therefore, HCA respectfully asks this Court to affirm the order of the Superior Court.

RESPECTFULLY SUBMITTED this 25th day of January 2021.

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CERTIFICATE OF SERVICE

I declare under penalty of perjury, pursuant to the laws of the State of Washington, that on the date below, the preceding "**WASHINGTON STATE HEALTH CARE AUTHORITY'S AMICUS CURIAE BRIEF**" was filed with the Supreme Court of the State of Washington via electronic mail (with the court's permission), and served via electronic mail on the following parties.

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DATED this 25th day of January 2021.

s/ Malai Jordan
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Please find the attached an email from the Court granting permission to file via email and the following documents for filing with the Court today:

- Washington State Health Care Authorities Motion to file Amicus Curiae Brief
- Washington State Health Care Authority's Brief

If you have any question, please feel free to contact me at 360-709-6464. In addition, could you please confirm receipt of this email?

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Thank you,

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